



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 8, 1995

Mr. Jeffry R. Hill
General Counsel
State Board of Dental Examiners
333 Guadalupe, Tower 3, Suite 800
Austin, Texas 78701-3942

OR95-1200

Dear Mr. Hill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 36134.

The State Board of Dental Examiners (the "board") received a request for six categories of documents related to complaints against certain dentists. You claim that a portion of the requested information is excepted from disclosure under the Dental Practice Act, as applied through section 552.101, and sections 552.103(a) and 552.107(1) of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.¹

You state that some of the information requested in number 1 can be obtained from individual investigative files maintained by the board. You claim, however, that this information is excepted from disclosure under article 4550, V.T.C.S., as applied through section 552.101 of the Government Code. Article 4550, section 2, provides:

All of the records and files of the Texas State Board of Dental Examiners shall be public records and open to inspection at reasonable times, except the investigation files and records which shall be confidential and shall be divulged only to persons so investigated upon completion of said investigation.

¹We note that you do not claim an exception to request numbers 4 and 6; therefore, we need not consider those requests in this ruling. We assume that you have released or will release the documents responsive to these requests to the requestor.

The documents containing the information sought in request number 1 are in the board's investigative files. The requestor is not the subject of any of the investigations. Therefore, the board must withhold these requested documents under section 552.101 of the Government Code.²

You claim that the document responsive to request number 2 is taken from a database that is kept for internal use as a method of tracking the progress of complaints filed with the board. You also claim that part of the information contained in this list is excepted from disclosure under article 4550, V.T.C.S. However, it does not appear that this list was used as part of any investigation or is part of an "investigative file" encompassed by article 4550, V.T.C.S. In a previous ruling, this office concluded that the board could withhold "other documents prepared for internal board use that relate to fact gathering by the board's staff to assess the validity of complaints." Open Records Letter No. 92-597 (1992). A list of dentists who have reported deaths does not "relate to fact gathering by the board's staff to assess the validity of complaints." Therefore, the board may not withhold the list responsive to request number 2 under article 4550, V.T.C.S.

You claim that the documents responsive to request numbers 3 and 5 are excepted from disclosure under section 552.103(a). Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The board has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The board must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that a lawsuit is currently pending between the board and each of the dentists who is the subject of request numbers 3 and 5. You have provided this office with pleadings in both lawsuits. Therefore, the board has met the first prong of section 552.103(a). We have reviewed the documents submitted to this office for review and conclude that they relate to the pending litigation. However, most of the documents have been seen by the opposing party. When the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the board may not withhold the following categories of documents: pleadings filed with the court, correspondence

²Because we conclude that you must withhold the information responsive to request number 1, we do not address your arguments that the board is not required to provide the information in the form requested. *But see* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 15, 1995 Tex. Sess. Law Serv. 5127, 5135 (Vernon) (to be codified as Gov't Code § 552.231).

with the court, correspondence with opposing counsel, documents produced by the opposing party, deposition transcripts, and correspondence with the mediator that the opposing party saw or had access to.³ The board may withhold the remainder of the submitted documents under section 552.103(a). We note that the applicability of section 552.103(a) ends once the litigation has been concluded.⁴ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).⁵

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 36134

Enclosures: Submitted documents

³The board may also not withhold documents produced to the opposing party unless those documents comprise the investigative file made confidential by article 4550, V.T.C.S.. The documents comprising the investigative file must be withheld under section 552.101.

⁴We note that although it appears that a settlement has been reached by the parties in the lawsuit involving Dr. Robinowitz, you inform us that final approval of that settlement has not been obtained nor have the settlement terms been complied with at this point. Consequently, no final judgment has been entered and the litigation is still pending.

⁵We note that you have marked one document in the correspondence file in the lawsuit involving Dr. Robinowitz, which you claim is excepted by section 552.107(1). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990) at 5, this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. The marked document is correspondence to the opposing counsel. Therefore, the board may not withhold this document under either section 552.103(a) or section 552.107(1).